Supreme Court, U.S.
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No. 09-727

In The
Supreme Court of the United States

RODRIQUE BRADLEY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Second Circuit Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On January 1, 2006, 15-year-old J.W. and her teenage aunt, A.W., were walking through their neighborhood in Shreveport, Louisiana. The girls were walking to what they described as a "candy house," a home where the owner sells candy to people in the neighborhood. Their route took them past the home of the then 23-year-old petitioner, with whom they were not acquainted. A.W. said that petitioner tried to speak with J.W. as they walked by, but J.W. ignored petitioner, and the two girls continued walking to the candy house.

The two girls met up with J.W.'s 15-year-old boyfriend, T.T., who lived nearby. While walking back to A.W.'s house, their route took them back past petitioner's home. According to the three teenagers, petitioner again spoke to J.W. as they walked by. T.T. told petitioner not to speak to J.W., and the three continued walking to A.W.'s house.

As they rounded a corner a few minutes later, the teenagers were alerted to petitioner's approach behind them. According to the three juveniles, petitioner was carrying a baseball bat. T.T. testified:

> And then [petitioner] walked up and he said something, and then [J.W.] got in front of me, and [petitioner] flinched like he was going to hit her and I told her to move before she got hit. And he swung the bat and I snatched it. Then we started fighting.

The girls gave similar accounts of the beginning of the fight. J.W. testified that when she got between petitioner and her boyfriend, she told them not to fight; petitioner then responded that it had nothing to do with her, but was between him and T.T.

T.T. was able to take the bat away from petitioner, and all three juveniles said that T.T. did not attempt to use the bat during the fight. T.T. and petitioner fought with their fists, with T.T. prevailing as petitioner stumbled back. Petitioner then began to back away. The juveniles testified that petitioner then reached into his waistband and pulled out a handgun. T.T. tried to run away, but the three teenagers and petitioner agreed that petitioner shot at T.T.; one of the bullets struck T.T. in the groin. Petitioner fled from the scene. Police recovered two .40 caliber shell casings from the scene, confirming that shots had been fired.

T.T. was taken to the hospital where he underwent surgery. One testicle was completely destroyed and only 1% of the other testicle was able to be saved. The jury heard from the treating surgeon how these injuries will have life-long effects on T.T., including precluding the possibility of fatherhood.

At his trial, petitioner chose to testify. He said that T.T. approached him and was "talking real aggressive" and started the argument. Petitioner said that T.T. started the fight by taking the baseball bat away from him and hitting him first on the arm and then on the back, knocking him to his knees.

Petitioner explained that he then pulled out his gun and fired it to stop T.T. from continuing to hit him with the bat. None of the state's witnesses described T.T. defending himself with anything other than his fists. Nor was petitioner able to adequately explain why he confronted T.T. while armed with a baseball bat and a loaded gun.

The jury found petitioner guilty as charged of Aggravated Second Degree Battery. The jury also found the special circumstance that a weapon was used or discharged by petitioner during the commission of the offense. The trial court found that this satisfied the requirement of La. C.Cr.P. art. 893.3 which provides levels of sentence enhancement for offenses involving firearms. Petitioner was sentenced to fifteen years imprisonment at hard labor subject to the conditions provided by law.

CORRECTION OF PETITIONER'S MISSTATEMENTS

1. Statement of the Case

Petitioner asserts that after the verbal disagreements between petitioner and the victim, "This escalated into a physical confrontation between T.T. and Rodrique Bradley. During this confrontation both a stick and a firearm were possessed by Rodrique Bradley and Rodrique Bradley discharged the firearm and T.T. was shot." (Pet.'s App. p. 4)

However, the trial record reveals that the petitioner was carrying not a stick but a baseball bat. Furthermore, this was not a physical confrontation between petitioner and T.T. but rather an attack by petitioner upon T.T.

2. Sentencing enhancement

Petitioner states: "The Louisiana Court of Appeal found that this jury form was incorrect but held that the existence of Louisiana Code of Criminal Procedure Article 893.3 factors was not a matter which had to be determined by a jury." (Pet.'s App. p. 4)

The actual determination of the Court of Appeal was not that broad. In its Opinion, it was stated:

> Although La. C.Cr.P. art. 893.3(D) requires a finding that the offender used a firearm, not merely a "weapon," and a finding that the use or discharge of the firearm "caused bodily injury," the verdict form presented to the jury did not require the jury to make either of those findings. Nevertheless, the defendant's counsel had the opportunity to consider both the charge to the jury and the verdict form before the (Pet.'s App. 23) case was submitted to the jury and specifically denied any objection to either the charge or the verdict form. In fact, the defendant admitted to shooting the victim, although the defendant claimed that the shooting was done in self-defense. In the absence of any objection, and because the

> sentence imposed is within the unenhanced statutory range for the crime and the victim of this offense was seriously and permanently injured during the offense, we find that this assignment of error is without merit. (Pet.'s App. 24)

ARGUMENT

MAY IT PLEASE THE COURT:

I. PETITIONER'S SENTENCE DOES NOT VIOLATE THE RULE PRONOUNCED BY THIS COURT IN *APPRENDI V. NEW JERSEY* AS IT DID NOT EXCEED THE STATUTORY MAXIMUM AND ANY VIOLATION DOES NOT REQUIRE REVERSAL UNDER THE HARMLESS-ERROR RULE

As a basis for seeking a writ of certiorari, petitioner argues that there is a conflict between the Louisiana courts and the decisions of this Court, notably *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2363, 147 L.Ed. 2d 435 (2000) over whether the Sixth Amendment requires all elements necessary for a firearm sentence enhancement to be submitted to a jury. The original sentencing scheme as set forth in the Louisiana Criminal Code called for the presiding judge to make a determination as to whether the sentencing factors had been adequately proven. In practice, Louisiana courts attempt to operate in accord with the jurisprudence of this Court. As shown below, respondent respectfully

asserts that the decisions of Louisiana courts, including the instant case, are in agreement with the jurisprudence of this honorable Court.

Respondent also disagrees with petitioner's contention that the rule set forth in *Apprendi* necessarily applies in this case. The offense of Aggravated Second Degree Battery carries a sentence of imprisonment at hard labor for up to fifteen years. La. R.S. 14:34.7(B). Petitioner's sentence of fifteen years at hard labor, although enhanced under La. C.Cr.P. art. 893.3, is within this range. Petitioner argues that because his sentence is subject to the statutory conditions of no suspension of sentence or parole pursuant to La. C.Cr.P. art. 893.3, it exceeds the statutory maximum of La. R.S. 14:34.7, for which suspension of sentence and parole are possible for *some* offenders. Whether petitioner would be otherwise eligible for suspension of sentence or parole is an open question. As this determination is not one that can be made by the sentencing judge, but instead by administrative procedures within the Department of Corrections, petitioner has not shown that the exclusion of the possibility of suspension of sentence or parole increased his maximum sentence exposure. Thus, there is no violation in this case of the rule of *Apprendi*, because *Apprendi* only applies when the enhanced sentence is more severe than the maximum sentence for the original offense.

Furthermore, even should *Apprendi* be found applicable, it is subject to harmless-error analysis. "Failure to submit a sentencing factor to the jury, like

failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006). When determining if an error is harmless, the test is whether there is a reasonable possibility the error might have contributed to the conviction and whether the court can declare a belief that the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), *rehearing denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed. 2d 241 (1967). The circumstances extant in this case lead to the conclusion that the error, if any, in this case was harmless. The verdict form presented to the jury (Pet.'s App. 30), although not in perfect form, was such that all elements relevant to petitioner's conviction and sentence were considered by the jury and found beyond a reasonable doubt.

Petitioner was charged with Aggravated Second Degree Battery, a felony offense under the Louisiana Criminal Code. Battery is defined in Revised Statute 14:33 of the Louisiana Criminal Code as the intentional use of force or violence upon the person of another. The elements of Aggravated Second Degree Battery are found in Louisiana Revised Statute 14:34.7, which reads as follows:

> A. (1) Aggravated second degree battery is a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury.
>
> (2) For purposes of this Section, "serious bodily injury" means bodily injury

> which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.
>
> B. Whoever commits the crime of aggravated second degree battery shall be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not more than fifteen years, or both.

The Bill of Information charging petitioner with this offense contains the following language:

> "Rodrique A. Bradley committed the offense of R.S. 14:34.7 Aggravated Second Degree Battery in that he committed a battery upon [T.T.] with a dangerous weapon, to-wit: GUN, where Rodrique A. Bradley intentionally inflicted serious bodily injury . . . "

For the jury to convict petitioner of this offense, they had to find beyond a reasonable doubt that petitioner committed a battery upon T.T. with a gun and thereby intentionally inflicted serious bodily injury. "Dangerous weapon" is a term defined in the Louisiana Criminal Code as any object, which in the manner used, is likely to cause death or great bodily harm. La. R.S. 14:2(13). Thus, while the dangerous weapon does not have to be a firearm under the Aggravated Second Degree Battery statute, in this case the State limited itself to proving that a firearm (or "gun") was

the dangerous weapon through the language of the Bill of Information.

A notice was subsequently filed indicating that the State intended to seek a firearm enhancement to any sentence pronounced in this case. The firearm enhancement statute, in relevant portion, reads as follows:

> La. C.Cr.P. art. 893.3
>
> . . .
>
> D. If the court finds by clear and convincing evidence that a firearm was actually used or discharged by the defendant during the commission of the felony for which he was convicted, and thereby caused bodily injury, the court shall impose a term of imprisonment of fifteen years; however, if the maximum sentence for the underlying felony is less than fifteen years, the court shall impose the maximum sentence.
>
> . . .
>
> F. A sentence imposed under the provisions of this Article shall not be suspended and shall be imposed in the same manner as provided in the felony for which the defendant was convicted.
>
> G. A defendant sentenced under the provisions of this Article shall not be eligible for parole during the period of the mandatory minimum sentence.
>
> . . .

> As discussed above, the State had already obligated itself through the language of the Bill of Information to prove that the dangerous weapon used in this case was a firearm. In order to utilize the firearm enhancement provision of La. C.Cr.P. art. 893.3(D), the State also had to prove that bodily injury was caused by the use or discharge of the firearm by petitioner during the commission of the felony. However, in order to prove the underlying offense of Aggravated Second Degree Battery, the State was required to prove that the use of the gun had caused serious bodily injury, a requirement that was stricter than, and inclusive of, the bodily injury requirement of the firearm enhancement statute.

Thus, *in this particular case*, the elements required to be proven under the firearm enhancement statute were already covered by the Bill of Information charging the underlying offense. While the jury verdict form (Pet.'s App. 30) was insufficient to support a firearm enhancement finding in every case, again in this particular case it showed that the jury found all elements necessary to prove both the underlying offense and the firearm enhancement provisions beyond a reasonable doubt. Thus the rule set forth in *Apprendi, supra,* was not violated by the utilization of the firearm enhancement in petitioner's case and the error in the verdict form, if any, was harmless.

II. THE APPLICABLE TEST OF *DOYLE V. OHIO* WAS UTILIZED BY THE COURT OF APPEAL AND THE HARMLESS ERROR STANDARD WAS CORRECTLY APPLIED

The circumstances underlying petitioner's second argument mirror closely the factual scenario set out in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976). In *Doyle*, the petitioners made no post-*Miranda* statements to investigators that they had been framed, an argument that they made for the first time at trial. This honorable Court found that the prosecutor's questions on cross-examination about this post-*Miranda* silence violated the petitioner's due process rights.

In this case, petitioner made no statements to the case detective at the time of his arrest. On cross-examination at trial, he testified over his counsel's objection regarding his silence and stated that it was on the advice of counsel. The prosecuting attorney pursued this line of questioning briefly in an attempt to undermine petitioner's story of self-defense, mentioned for the first time at trial. Again, in closing arguments, the prosecutor referred to petitioner's failure to mention self-defense to the investigating officer. Unlike *Doyle*, it is unclear in this case if petitioner was read his *Miranda* rights prior to his decision to exercise his Fifth Amendment rights. For purposes of its analysis, the Louisiana Second Circuit Court of Appeal assumed that petitioner had been advised of his rights per *Miranda*, thus necessitating

the application of the rule pronounced in *Doyle* to this case.

Recognizing that the questions and remarks of the prosecutor in this case were violative of the principle announced in *Doyle*, the Court of Appeal then applied the *Chapman, supra,* harmless-error analysis pursuant to this Court's ruling in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993). In *Brecht*, this Court reasoned that *Doyle* violations were amenable to the harmless-error analysis on direct appeal. After concluding that the evidence against petitioner, leaving aside the objectionable testimony, was overwhelming, the Court found that the error was harmless.

The Ruling of the Court of Appeal (Pet.'s App. 16, 19) recognized the controlling jurisprudence of this Court as set forth in *Doyle, Brecht,* and *Chapman*. Furthermore, the Court of Appeal applied those principles to the facts of petitioner's case in a reasoned and credible manner. As the lower court's decision did not conflict with the decisions of this honorable Court on the federal questions presented, the granting of a writ of certiorari in this case would not be helpful in clarifying any important issues of Constitutional law.

CONCLUSION

Respondent State of Louisiana shows that the writ should not be granted in the instant case:

I. The Louisiana Second Circuit Court of Appeal did not err in applying the harmless-error standard to any *Apprendi* violations that may have resulted from petitioner's firearm sentence enhancement.

II. The Ruling of the Louisiana Second Circuit Court of Appeal was in compliance with this Court's jurisprudence and presents no federal question requiring clarification.

WHEREFORE, the State of Louisiana prays that Rodrique Bradley's application for writ of certiorari be denied.

Respectfully submitted,

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